85-2164

Supreme Court, U.S.
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JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WALTER D. AMES AND MARION L. AMES,
Petitioners,

vs.

STANDARD OIL COMPANY (INDIANA),
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER D. AMES
Counsel of Record
1400 K Street, N.W.
Washington, D.C. 20005
(202) 628-0088

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Does complete denial of the right to pending discovery constitute denial of due process of law when the evidence necessary to sustain a cause is within the exclusive control of a summary judgment movant from whom discovery is sought?

THE PARTIES

The parties before this Court are those set forth in the caption, except that respondent has, on information and belief, changed its name to Amoco Corporation.

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NO. 86-

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

WALTER D. AMES and MARION L. AMES,

Petitioners,

vs.

STANDARD OIL COMPANY (INDIANA),

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Walter D. Ames et al., respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 12, 1986, or, preferably, that the order be vacated with instructions to permit petitioners discovery.

OPINION BELOW

The one-page opinion and order of the court of appeals is unreported. It is annexed as Appendix A. An order denying the petition for rehearing is Appendix B. A memorandum opinion and order of the District Court granting summary judgment to respondent on several of the claims is Appendix C. The district court order dismissing the action is Appendix D. The order of the Magistrate staying plaintiff's discovery is Appendix E.

JURISDICTION

The order of the court of appeals was entered on February 12, 1986. A petition for rehearing [A-3] was denied on April 3, 1986, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISION INVOLVED

No person shall ... be deprived of life, liberty or property, without due process of law.... [Amendment 5]

STATEMENT OF THE CASE

Petitioners Ames have filed a second amended complaint that contains multiple counts, of which only the counts for breach of written contract and breach of an oral contract will be referred to as the basis for this petition. In support of their breach of contract counts, petitioners commenced discovery by filing interrogatories under Rule 33, requests for production under Rule 34, and requests for admissions under Rule 36, F.R.Civ.P. Respondent Standard Oil Company (Indiana) moved for an extension of time and then a further extension, which was denied. Standard Oil was given a fixed period of time to respond to plaintiff's discovery by the Magistrate to whom discovery matters had been referred.

Standard Oil had moved for summary judgment on all counts of the complaint other than the breach of oral contract, which count was later included by reply brief. One of the bases of Standard Oil's motion was that the dispute over the written contract was subject to arbitration. On that basis Standard Oil moved for reconsideration of the Magistrate's order enforcing discovery, and by order of May 7, 1984 [A-23] the Magistrate reversed his prior order and stayed all of petitioners' discovery until "...the [District] Court decides the pending motion on the threshold ground of whether the dispute between the parties is subject to arbitration." Sensing what was happening, petitioners appealed from the Magistrate's order and moved the district court for a modification of its scheduling order to permit discovery, and for a pretrial conference or discovery conference.

In a memorandum opinion and order filed July 26, 1984, the district court granted the motion

for summary judgment on the merits of the breach of written and oral contract claims, the former because the contract was said to be unambiguous [A-10], the latter on the basis that a writing was required. [A-12] It also refused to modify the scheduling order to permit discovery. [A-20] By contrast to the Magistrate's order staying discovery until the threshold issue of arbitrability had been determined, the counts for breach of contract were decided on the merits, with the stay of all discovery in effect.

An order dismissing the entire action followed. [A-22]. Before the court of appeals, respondent's motion for summary affirmance was granted. [A-1]

STATEMENT OF FACTS

The underlying facts are that in 1973 Solarex Corporation was formed in Rockville, Maryland. At one time Solarex was the world's leading producer of solar cells for terrestial use. Solar cells

are impregnated wafers which, when exposed to light, convert that light directly into electricity.

In 1979 respondent Standard Oil entered the picture. A key provision in an agreement of May 25, 1979 between Standard Oil and Solarex was that when Standard Oil owned more than 40% of the outstanding shares of class A common stock of Solarex, it would make a tender for the remaining shares at a certain price. In support of its motion for summary judgment Standard Oil by affidavit swore that its percentage of class A common stock never exceeded 39%. In making that assertion Standard Oil did not count other classes of Solarex stock it owned, including a class convertible into class A common stock.[1/]

1/ Petitioners have information that class A common stock of Solarex into which Standard Oil's stock could be converted had actually been issued, but could not take discovery to prove it.

Regarding the oral contract, at an annual meeting of Solarex shareholders on April 30, 1982, Standard Oil's manager of corporate development promised Solarex shareholders that Standard Oil would shortly make a tender offer for their stock. Petitioners Ames accepted that offer. Standard Oil never made the tender.2/

The fortunes of Solarex declined rapidly thereafter. On September 16, 1983 Solarex was merged into a subsidiary of Standard Oil and the Solarex shareholders paid a small fraction of the price at which Standard Oil would have had to pay on a tender offer. All the Solarex documents, including those that would show writings of the oral promise and issuance of class A shares to Standard Oil, were delivered to the possession of that respondent.

2/ Petitioners have information that the tender offer was actually reduced to writing, but could not take discovery to prove it.

REASON FOR GRANTING CERTIORARI

Although this Court has approached the question before, it has not had occasion to assess whether complete denial of discovery is a denial of due process of law. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947) would so indicate.

PROPER DISCOVERY IS THE SINE QUA NON OF DUE PROCESS

Prior to the present litigation, petitioners had not believed that there was any doubt about the propriety of reasonable discovery, i.e., discovery that did not approach harassment. The Federal Rules of Civil Procedure devote 12 rules to discovery. As this Court said in Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 391 (1947):

> Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant.

* * *

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatement ... Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

If mutual knowledge of all the relevant facts is essential to proper litigation, how can this tenet be squared with denial to petitioners of all discovery: interrogatories, requests for production, requests for admissions?[3/]

The statement in Hickman v. Taylor that discovery rules are to accorded broad and liberal treatment was echoed in Schlagenhauf v. Holder, 379 U.S. 104, 114, 85 S.Ct. 234, 241 (1964). In First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575 (1968), at issue was the balancing of discovery had by parties, and

---

3/ Thereafter, petitioners planned to take such depositions as appeared necessary on the basis of documents produced.

whether the petitioners should have been permitted additional discovery. No such fine balancing is requisite here. Petitioners have had nothing of their proposed discovery. Their information of issuance of class A common shares to cover Standard Oil's preferred shares could not be verified. Their information that there were writings regarding Standard Oil's promise to make a tender offer could not be presented to the court.

Indeed, since Standard Oil went to the edge (39%) of acquiring the 40% trigger percentage of shares, it is not inconceivable that Standard Oil made a good faith error in calculation. If a litigant must rely on the determination of his opposing party without discovery, litigation is reduced to a contest of who possesses the pertinent documents, and in this case Standard Oil has all the documents.

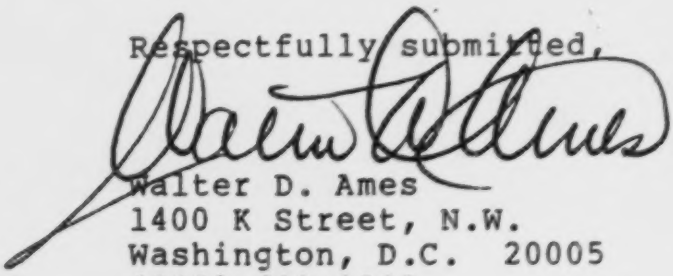
Petitioners recognize the temporal exigencies that bear on this Court. They do not seek a full examination on the merits. Instead, the utter

denial of discovery to petitioners here is submitted to be a violation of due process that this Court can correct without a large expenditure of its time.

CONCLUSION

The petition should be granted and the order [App. A] from which appeal is taken vacated, with instructions that the court of appeals order that the district court orders [App. C and D] be vacated and that petitioners be permitted full and adequate discovery prior to trial or resolution of any dispositive motion brought by respondent.

Respectfully submitted,



Walter D. Ames
1400 K Street, N.W.
Washington, D.C. 20005
(202) 628-0088

Attorney for petitioners
and pro se

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5997 September Term, 1985

C.A. NO. 83-01183

Filed: February 12, 1986

Walter D. Ames, et al.,

Appellants

v.

Standard Oil Company (Indiana)

BEFORE: Robinson, Chief Judge
Wald and Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellee's motion for summary affirmance, the opposition, and the reply thereto, it is

ORDERED by the court that the motion for summary affirmance is granted. In reviewing a ruling of a trial court on a motion to dismiss under Federal Rule of Civil Procedure 41(b), this court must affirm the ruling unless the trial

court has clearly abused its discretion. Hobson v. Wilson, 737 F.2d 1, 45 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1843 (1985). In the instant case the trial court did not abuse its discretion. Since it is abundantly evident that the district court has correctly decided this matter, further briefing and oral argument would not affect this court's decision. See Sills v. Bureau of Prisons, 761 F.2d 792, 794 (D.C. Cir. 1985).

The clerk is directed to withhhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14.

Per Curiam

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5997 September Term, 1985

C.A. NO. 83-01183

Filed: April 3, 1986

Walter D. Ames, et al.,

v.

Standard Oil Company (Indiana)

BEFORE: Robinson, Chief Judge; Wald and Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER,
CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER D. AMES and MARION L. AMES, Plaintiffs	)
v.	) C.A. No. 83-1183
STANDARD OIL COMPANY (Indiana), Defendant	) Filed July 26, 1984

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In 1979, Standard Oil Company (Standard) invested in the Solarex Corporation and signed a Stock Purchase Agreement dated May 25, 1979, of which Section 10(d) is at issue.

> At such time as a purchase of shares by Standard results in its ownership of more than 40% of the outstanding shares of class A common stock, Standard will extend an offer to other stockholders to purchase all shares offered to it within the succeeding one year at a price per share no lower to [sic] that last paid by Standard for Class A common stock

> in an arms length transaction with any of the Sellers, provided no materially adverse change in the business of Solarex occurs in such period. Any dispute arising out of this paragraph shall be subject to arbitration as provided in Section 15 hereof.

Section 15 stated that all disputes shall be settled by arbitration. The Stock Purchase Agreement provided that Standard purchase 580,000 shares of Class A common stock and 580,000 shares of Class B non-voting common stock at an agreed price. At the time of Standard's initial investment, both classes existed.

Pursuant to the terms of the Agreement dated October 3, 1980, Standard purchased 400,000 shares of Solarex Preferred Stock Series 1-5 which could be converted into Class A common after September 30, 1985. Standard also purchased shares in Semix, Inc., a majority owned subsidiary of Solarex.

In 1982, Standard made additional purchases of Class A common and Preferred Series 1-5 stock pursuant to an agreement dated February 4, 1982

and the October 3, 1980 agreement. As of April 25, 1983, the date plaintiff filed his complaint, Standard owned less than 39% of Class A common and continued to own less than 39% through the date of the subsequent merger between Solarex and Amoco Solar.

Plaintiffs allege several causes of action in connection with the stock agreement and purchases by Standard. First plaintiff asserts a breach of contract claim by equating the Class B common stock, the Preferred Series 1-5 stock and the Semix stock purchased by Standard with the Class A common stock of Section 10(d) of the Stock Purchase Agreement dated May 25, 1979. Plaintiffs assert that this interpretation of Section 10(d) would indicate a breach by Standard since Standard would have exceeded the 40% threshold thus becoming obligated to make an offer to buy plaintiffs' shares.

Plaintiffs allege a tortious interference with contractual relationship and move to file a second

amended complaint relabeling the tortious interference count to state a fraud cause of action. Further, plaintiffs' first amended complaint alleges a RICO violation under 18 U.S.C. § 1961, et seq.

Standard seeks summary judgment on each of the above counts asserting that the arbitration clause in § 10(d) is appropriate to resolve the dispute and alternatively that plaintiffs have no grounds for each cause of action.

Breach of Contract Claim

Parties agree that Standard never owned greater than 40% of the Class A common stock. However, plaintiffs allege that the parties' understanding was that Standard's ownership of other classes of stock should be added to the amount of Class A common to meet the 40% threshold under the agreement requiring a buy-out offer be made to plaintiffs. Parties agree that the plaintiffs, as shareholders, were third party beneficiaries to the agreement containing

§ 10(d). As a general rule, a "promisor may assert against the beneficiary any defense that he could assert against the promisee if the promisee were suing on the contract." Schneider Moving and Storage Co. v. Robbins, 52 U.S.L.W. 4476, 4477 (U.S. April 18, 1984). The defense of failure to arbitrate is good against third party beneficiaries to a contract with an arbitration provision. See e.g., 2 Williston on Contracts § 364A at 877 (Rev. Ed.).

Plaintiffs assert that they are not bound by the § 10(d) arbitration clause since the general rule should apply only to creditor beneficiaries and plaintiffs assert they are donee beneficiaries. In support of this claim, plaintiffs cite Schneider in which trustees who were donee beneficiaries were permitted to sue thus avoiding an arbitration clause. Schneider involved a collective bargaining agreement between a union and two employers which, inter alia, required the employers to contribute to two

multi-employer pension trust funds. These funds were administered by trustees under agreements that were separate from the collective bargaining agreement. The trustee agreements provided the trustees with power to enforce employer's contributions to the funds through any appropriate legal proceeding. Schneider, supra, at 4476. The presence of the separate trustee agreements, not solely the trustees' designation as donee beneficiaries, empowered the trustees to maintain their actions in court without arbitration under the contract. Id. at 4478. As the defendant notes, plaintiffs in the instant case have no separate agreement that would exclude them from the general rule. It would be inequitable for plaintiffs to reap the benefits of the contract as third party beneficiaries without being bound by the arbitration clause contained therein as a mechanism to handle disputes. Thus, plaintiffs have presented no authority for their assertion

that a creditor beneficiary is bound to an arbitration clause but a donee beneficiary is not.

Further, defendant's motion for summary judgment on the breach of contract cause of action will be granted since plaintiff may not claim that the language of the agreement requiring more than 40% ownership of Class A common means ownership of shares other than Class A common since it is inconsistent with the language of the contract. The agreement provides for the application of Delaware law (Defendant's Exhibit 1, Motion for Summary Judgment, ¶ 15.2) and in that jurisdiction, where the contract is clear and unambiguous, the language is given its plain effect. Myers v. Myers, 408 A.2d 279, 280 (Del. 1979); see also, Nepa v. Marta, 415 A.2d 470, 473 (Del. 1980) ("in the absence of ambiguity, there is no room for construction"); Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 343 (Del. 1983).

Plaintiffs' reliance on an alleged oral comment made by Dr. Varadi, a party to the contract, affirming the accuracy of the plaintiffs' draft complaint containing a breach of contract action does not assist the plaintiffs since such a statement is barred by application of the parol evidence rule. Aetna Insurance Co. v. Newton, 274 F. Supp. 566, 571 (D.Del. 1967), appeal dismissed, 398 F.2d 729 (3d Cir. 1968), on remand 315 F. Supp. 810 (D.Del. 1970), aff'd 456 F.2d 655 (3d Cir. 1972). The integration clause in the agreement (Defendant's Exhibit 1, ¶ 16) reinforces this analysis. Beach v. KDI Corp., 344 F. Supp. 1230, 1234 (D.Del. 1972).

Therefore, under both the general rule for third party beneficiaries and arbitration clauses and the prohibition against contradicting an unambiguous written contract with parol evidence, summary judgment will be granted defendant on the breach of contract claim.

Oral Promise

Under plaintiffs' second amended complaint, Ames alleges that Standard breached an oral promise made by Gordon McKeague, manager at Standard, stating that Standard would purchase Solarex shares in the future. Summary judgment is granted defendant on the oral contract claim since an oral agreement to purchase securities is uneforceable under the Statute of Frauds. Uniform Commercial Code § 8-319 as adopted in Delaware (6 Del. Code § 8-319) and Md. [Com. Law] Code Ann. § 8-319 (1975) (where the alleged oral promise was made and accepted).

Tortious Interference

Plaintiffs in their pleadings have admitted that as a matter of law, Standard could not have tortiously interfered with its own contract. Plaintiffs' Opposition Brief Part 2 at 2-3. The tort arises only when there is an interference with a contract between plaintiff and one who is not a party to the contract. Donohoe v. Watt, 546

F. Supp. 753, 757 (D.D.C. 1982), aff'd, 713 F.2d 864 (D.C. Cir. 1982); Metro D.C. Parking, Highway & Construction Materials Council v. Roubin & Janerio, Inc., 93 CCH Lab. Cas. ¶ 13,443 (D.D.C. May 26, 1981) ("a defendant's breach of his own contract does not provide a basis for tortious interference with that same contract.") (citing Prosser, Torts § 129 at 934 (1971)). Defendant's motion for summary judgment will be granted as to the tortious interference cause of action.

Racketeer Influenced and Corrupt Organizations Court

Plaintiffs claim a violation of the RICO statute, 18 U.S.C. 1961, et seq., alleging Standard engaged in activities which constitute "fraud in the sale of securities" under 18 U.S.C. § 1961(1). Plaintiffs allege that Standard and Dr. Lindmayer, parties to the agreement, conspired to avoid the intent of § 10(d) by interstate activities and that plaintiffs were injured since they were "entitled to be recipients of such

tender offer by Standard Oil" which was not forthcoming as a result of Standard's alleged fraudulent conduct in buying Solarex stock other than Class A common. (Plaintiffs' Complaint at 24; Deposition Transcript of Walter Ames at 74.) Plaintiffs assert a violation of § 1962(b), (c) and (d) which provide that:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Under a RICO allegation, plaintiffs must allege that plaintiffs sustained injuries that "were caused by the distinctive RICO violation, and not simply by the commission of the predicate offense." Guerrero v. Katzen, 571 F. Supp. 714, 718 (D.D.C. 1983). Plaintiffs fail to allege with particularity any fraudulent sales of securities by Standard. In Guerrero, the RICO claim was dismissed under Federal Rule 12(b)(6) since plaintiffs alleged only that they were injured by reason of the underlying fraud. The court found that the allegations in the RICO count "add nothing to the substance of the claim." Id. at 720, quoting Harper v. New Japan Security International, Inc., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982).

Fraud in the sale of securities is questionable since there are no specific allegations setting forth the alleged fraudulent activity by Standard that comports with 18 U.S.C. 1961, et seq. The fraud alleged is the attempt to

avoid § 10(d) by Standard's purchase of other classes of stock. No allegation is made that Standard had a legal or contractual obligation to purchase Class A common or that there was any legal impediment to Standard's investment in other classes of Solarex stock. The only possibility of finding an impediment to purchasing other classes of stock would be through an interpretation of the contract's Section 10(d) favorable to plaintiff. As herein ordered, arbitration is the process to resolve contractual disputes arising under § 10(d).

Defendant further asserts that plaintiffs must plead their RICO claim with specificity required under Rule 9(b), Fed. Rules of Civ. Pro. Rule 9(b) extends to the essential elements of the particular type of racketeering violation that is here alleged. Consequently, the plaintiffs must state with particularity the nature of the enterprise alleged as well as the acts constituting the basis for the underlying claims of fraud in the sale of securities. Rule 9(b)

precludes generally averring fraud since "[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should seek to redress a wrong, not to find one." Segal v. Gordon, 467 F.2d 602, 607-088 (2d Cir. 1972).

Although holding serious doubt as to the sufficienty of the plaintiffs' RICO allegation, this Court recognizes that the plaintiffs have been severely restricted in their discovery attempts. Plaintiffs have filed an objection to the Magistrate's order dated May 7, 1984 staying plaintiffs' discovery requests until this Court has ruled on the dispositive motions. Plaintiffs further have moved for a modification of this Court's scheduling order. Both motions are hereby denied since extensive discovery before arbitration would be a waste of resources. The count alleging a RICO violation will be stayed until such time as the parties have, through arbitration, interpreted the agreement. At such

time, if the RICO claim is still at issue, plaintiff will have leave to file an amended complaint in conformity with Federal Rule of Civil Procedure 9(b). An interpretation of the contract through arbitration may resolve whether or not it could be fraudulent to attempt to circumscribe § 10(d).

Second Amended Complaint

Plaintiffs moved to file a second amended complaint relabeling the tortious interference count to fraud. Plaintiffs incorrectly assert that the amendment is semantic only and makes no substantive changes. The fraud count alleges that Standard entered the 1979 agreement with the intent to avoid § 10(d) and thus fraudulently induced Solarex to enter that contract. As under the RICO count, plaintiffs have failed to allege the fraud count with the specificity required under Rule 9(b), Federal Rules of Civil Procedure. As stated herein, the settlement of disputes as to § 10(d) is to be decided by

arbitration. Whether purchase of stock other than Class A common was restricted by § 10(d) is a matter subject to arbitration under the language of the contract between the parties. Therefore, plaintiffs' motion to file a second amended complaint is granted and the fraud count is hereby stayed until after resolution of the language of the contract by arbitration. At such time, if pursuing the fraud claim is appropriate, plaintiff will have leave to file an amended complaint alleging the fraud with specificity as required under Rule 9(b).

Rebuttal Brief

Plaintiffs submitted a rebuttal brief, lacking any additional legal or factual support to the defendant's reply to plaintiffs' opposition to defendant's motion for summary judgment. Defendant moved to strike the rebuttal brief with plaintiffs opposing and requesting an award of expenses on defendant's motion to strike plaintiffs' rebuttal brief. The Federal Rules of

Civil Procedure do not provide for a rebuttal brief and defendant's motion to strike will be granted.

It is hereby the 25th day of July, 1984

ORDERED that defendant's motion for summary judgment as to the breach of contract claim will be granted as arbitration is the appropriate dispute resolution mechanism; and it is

FURTHER ORDERED that defendant's motion for summary judgment will be granted as to the breach of oral promise claim; and it is

FURTHER ORDERED that defendant's motion for summary judgment will be granted as to the tortious interference claim; and it is

FURTHER ORDERED that the motion to file a second amended complaint is granted; and it is

FURTHER ORDERED that the motion for modification of the Court's scheduling order is denied; and it is

FURTHER ORDERED that the RICO and Fraud counts are stayed until such time as arbitration is completed and plaintiff may then file, if appropriate, a third amended complaint in compliance with Federal Rule of Civil Procedure 9(b); and it is

FURTHER ORDERED that plaintiffs' rebuttal brief be stricken from the record.

_____

Thomas F. Hogan
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER D. AMES, et al.	)
	)
Plaintiffs	)
	)C.A. No. 83-1183
v.	)
	)
STANDARD OIL COMPANY (Indiana),	)Filed July 28, 1985
	)
Defendant	)

O R D E R

Upon consideration of the defendant's Motion to Dismiss, the plaintiffs' opposition thereto, the entire record, and in accordance with the memorandum opinion issued this day, it is this 26th day of July, 1985, hereby

ORDERED that the above captioned case shall be and is dismissed.

Thomas F. Hogan
United States District Judge

A-23
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER D. AMES, ET AL.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 83-1183
STANDARD OIL COMPANY (INDIANA),	)	Judge Hogan
Defendant.	)	

O R D E R

Upon consideration of defendant's motion for reconsideration of the Magistrate's Order of April 13, 1984, or in the alternative for modification of that Order, the opposition and reply thereto, it is this 7th day of May, 1984,

ORDERED that the motion to reconsider be and hereby is granted, and it is further

ORDERED that the defendant's reply to the plaintiff's discovery requests including plaintiff's requests for admissions be stayed until after the Court decides the pending motion for summary judgment or dismissal on the threshold ground of whether the dispute between the parties

is subject to arbitration. Should the pending motion be denied on the grounds that this litigation is not subject to arbitration, the defendant shall respond to the plaintiff's discovery requests within 45 days of the entry of such Order.

Patrick J. Attridge
United States Magistrate

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2164

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WALTER D. AMES and MARION L. AMES,
Petitioners,

v.

STANDARD OIL COMPANY (INDIANA),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT STANDARD OIL COMPANY (INDIANA) IN OPPOSITION

THOMAS D. YANNUCCI
(Counsel of Record)
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5056
Attorney for Respondent Amoco Corporation (formerly Standard Oil Company (Indiana))

Dated: August 1, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether this Court should review a dismissal for failure to prosecute and "blatant disregard of court orders and rules," summarily affirmed by the Court of Appeals, particularly when petitioners directly defy the rules of this Court by failing both to inform the Court of the grounds for dismissal or to append a reported decision setting forth the reasons for dismissal.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Federal Rule of Civil Procedure 41(b), "Involuntary Dismissal: Effect Thereof," provides in relevant part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

2. Local Court Rule 1-14 of the United States District Court for the District of Columbia, "Dismissal for Failure to Prosecute" (identical to its successor, Rule 211, effective April 1, 1986), provides:

> A dismissal for failure to prosecute may be ordered by the court upon motion by an adverse party, or upon the Court's own motion. An order dismissing a claim for failure to prosecute shall specify that the dismissal is without prejudice, unless the court determines that the delay in prosecution of the claim has resulted in prejudice to an opposing party.

3. Rule 21 of the Rules of the Supreme Court of the United States, "The petition for certiorari," provides in relevant part:

> .1. The petition for writ of certiorari shall contain, in the order here indicated:
>
> . . .
>
> (d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.
>
> . . .
>
> (k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

. . .

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and accurate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2164

WALTER D. AMES and MARION L. AMES,
Petitioners,

v.

STANDARD OIL COMPANY (INDIANA),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT STANDARD OIL COMPANY (INDIANA) IN OPPOSITION

INTRODUCTION

Although the Court would not know it from reading their Petition for a Writ of Certiorari, petitioners' complaint was dismissed by the District Court due to petitioners' failure to prosecute and for "blatant disregard of court orders and rules." *Ames* v. *Standard Oil Co. (Indiana)*, 2 Fed. R. Serv. 3d 528, 531 (D.D.C. 1985). The District Court's comprehensive Memorandum Opinion details the conduct which the Court of Appeals agreed made it "abundantly evident" that such dismissal was warranted. Yet, in an action which demonstrates why dismissal was appropriate, petitioners violated the rules of this Court not only by omitting this Memorandum

Opinion from their petition but also by concealing that the dismissal below was for failure to prosecute.[1]

Petitioner Walter Ames, proceeding *pro se*, has been a member of the Bar for more than 30 years and is a partner in an established Washington, D.C. law firm.[2] His conduct therefore is particularly inexcusable and itself constitutes "a sufficient reason" to deny the petition. *See* Supreme Court Rule 21.5. In addition, it indeed is "abundantly evident," as the Court of Appeals found (Opp. at A13), that the District Court's dismissal was appropriate and thus does not raise a legal issue worthy of consideration by this Court. Two courts have found that the dismissal was merited, and there is no reason for the Court to review those findings of fact, particularly in view of a trial court's broad discretion under Fed. R. Civ. P. 41(b) to dismiss an action.

Moreover, petitioners' transparent effort to have this Court review prior interlocutory orders—and not the final order dismissing the case—is flatly contrary to undisputed legal principles. Review of prior interlocutory orders upon dismissal for failure to prosecute would turn the *sanction* of dismissal into a *certification* for appeal of those interlocutory rulings. Finally, these interlocutory orders constituted wise exercises of discretion in

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[1] Petitioners discuss the District Court's July 1984 interlocutory order for three pages in their Petition for a Writ of Certiorari ["Pet."] and then simply state that "[a]n order dismissing the entire action followed" which was subsequently summarily affirmed by the Court of Appeals. (Pet. at 5.) Petitioners then append the Order from July 1985 (Pet. at A22), but conspicuously omit the accompanying Memorandum Opinion which it references.

For completeness and ease of reference, respondent has included in the Appendix to this Brief in Opposition ("Opp.") the dismissal by the Court of Appeals of petitioners' first appeal to that court (Opp. at A1-2), the District Court's July 1985 final order of dismissal and accompanying Memorandum Opinion (Opp. at A3-12), and the Court of Appeals' summary affirmance of that order (Opp. at A13).

[2] II *Martindale-Hubbell Law Directory* 705B, 706B (1985).

any event, and no purpose would be served by now reviewing those decisions even if they were before the Court.[3]

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete and substantially irrelevant to the order at issue. Respondent Standard Oil Company (Indiana) [hereinafter "Standard"] [4] thus presents the following restatement of facts.

A. The District Court's 1984 Interlocutory Orders.

This action originally was brought pursuant to a 1979 Stock Purchase Agreement ("Agreement") under which the petitioners claim they are third-party beneficiaries. Petitioners' claims arise in substantial part, if not entirely, under a Section in the Agreement which expressly requires that "[a]ny dispute" arising under it "shall be subject to arbitration . . . ." (Pet. at A5.) Nonetheless, in April 1983 petitioners filed their multi-count complaint in the United States District Court for the District of Columbia.

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[3] Simultaneous with filing this Opposition, respondent is filing a motion and memorandum pursuant to Supreme Court Rule 49.2 and 28 U.S.C. §§ 1912, 1927 (1982) seeking double costs and attorney's fees from petitioners for filing their misleading and frivolous petition for writ of certiorari.

[4] Standard amended its Articles of Incorporation in 1985 to change its name to Amoco Corporation. For ease of reference and continuity with other pleadings in this matter, however, respondent will be referred to herein as Standard. The following companies are all those in which Amoco Corporation has a direct or indirect ownership interest and which have outstanding securities in the hands of the public: Amoco Company, Analog Devices, Inc., Automating Peripherals, Ltd., Black Feet Indian Writing Co., Cetus Corporation, F M 4 Gila River Corporation, Gigabit Logic, Inc., Highland Community Bank, High Life Helicopter, Inc., Packet Technologies, Inc., Superphone Corporation, TAC Systems, and Tenco Hydro, Inc.

Standard thereafter moved for summary judgment and/or dismissal on the grounds that the claims must be submitted to arbitration and, alternatively, that each count should be dismissed on its merits. Pursuant to Fed. R. Civ. P. 26(c), Standard requested and obtained a protective order staying discovery while that motion was pending (Pet. at A23-24) on the grounds that discovery would be unnecessary if the District Court ruled in favor of Standard on its dispositive motion.

In July 1984, the District Court, per Judge Thomas Hogan, granted Standard's motion for summary judgment on two of petitioners' claims and stayed consideration of a third claim pending arbitration to interpret the Agreement. Judge Hogan determined, first, that it "would be inequitable" for petitioners "to reap the benefits of the contract as third party beneficiaries without being bound by the arbitration clause" contained in the same Agreement. (Pet. at A9.) The Court found, second, that two counts of the Complaint should be dismissed on the merits, one because it conflicted with the "clear and unambiguous" language of the Agreement and another (an alleged oral promise to purchase securities) because it was barred by the Statute of Frauds. (Pet. at A10-12.)

The District Court thus ordered a stay of further litigation as to the third count and an additional proposed count based on fraud, pending arbitration to obtain an interpretation of the Agreement which would determine if those counts were viable. (Pet. at A17-19.)

B. The District Court's July 1985 Final Order Of Dismissal For Petitioners' Subsequent Failure To Prosecute And "Blatant Disregard Of Court Orders And Rules".

The conduct by petitioners that led to dismissal of their case began shortly after issuance of the July 1984 interlocutory order. Petitioners' appeal of that ruling—sub-

sequently described by Judge Hogan as "frivolous" (Opp. at A8)—was quickly dismissed on the grounds that the July 1984 order was neither a final order nor an appealable interlocutory order. *Ames* v. *Standard Oil Co. (Indiana)*, C.A. 84-5596 (D.C. Cir. 1985) (issued Jan. 9, 1985), *reh'g denied*, Feb. 20, 1985. (Opp. at A13.)

As detailed in Judge Hogan's subsequent Memorandum Opinion, petitioners then began compiling a "record of dilatory prosecution" which made it apparent that they "were desperately scrambling to avoid the arbitration process." (Opp. at A8, A10.) Any one of several petitioners' actions provided ample ground for dismissal; taken together, they compelled it:

- For almost an entire year, petitioners refused to proceed to arbitration. (Opp. at A8.)
- Mr. Ames inexcusably failed to attend a court-ordered status conference. (Opp. at A4.)
- Mr. Ames failed to file a court-ordered status report, asserting he did not receive official notice that one was required, but then purposefully ignored the order after he received actual notice of it. (Opp. at A4, A8 n.5.)
- Mr. Ames violated a third court order by attempting to again amend petitioners' complaint prior to arbitration. (Opp. at A5.)
- Mr. Ames failed to initiate arbitration after an express warning from the District Court that he had thirty days to do so or face dismissal for failure to prosecute. (Opp. at A9.)

Finding that no lesser sanction was appropriate and acting under the authority of Fed. R. Civ. P. 41(b), Local Rule 1-14 (now Rule 211) and the court's inherent power, Judge Hogan dismissed petitioners' entire action on July 28, 1985 for failure to prosecute and "blatant disregard of court orders and rules." (Opp. at A8 n.10, A6.) Ob-

serving at one point that Mr. Ames had skirted "the ethical obligations of the bar" by "blithely ignor[ing] the existence of outstanding Court orders" Judge Hogan concluded that Mr. Ames, "equipped with the knowledge and expertise of a practicing attorney, bears full responsibility for its own fate." (Opp. at A8-9 n.5, A10 n.7.) Judge Hogan's eleven page opinion, which was neither referenced by the petition nor attached to it, was subsequently reported at *Ames* v. *Standard Oil Co. (Indiana)*, 2 Fed. R. Serv. 3d 528 (D.D.C. 1985).

C. The Summary Affirmance By The Court Of Appeals Of The July 1985 Final Order.

Petitioners lodged a second appeal following the July 1985 final order. Standard moved for summary affirmance of the order, explaining that any continuing objections petitioners' might have to the prior 1984 interlocutory orders were, of course, now moot. As anticipated, petitioners argued in response that the year-old interlocutory orders were subject to review, yet cited no authority to support that proposition.[5] Standard reiterated in its Reply Memorandum that, under established law, a dismissal for failure to prosecute moots objection to prior interlocutory orders.

By *per curiam* order issued February 12, 1986, the Court of Appeals summarily affirmed Judge Hogan's dismissal. (Opp. at A13.) The court left no doubt that it was reviewing the dismissal for failure to prosecute and that it agreed with the District Court's analysis of that issue:

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[5] The only case petitioners cited in their legal argument did not pertain to dismissal for failure to prosecute and, in fact, granted a motion for summary affirmance. *See Opposition of Plaintiffs-Appellants to Motion for Summary Affirmance*, submitted December 6, 1985, at 9-10 (citing *U.S.* v. *Glover*, 731 F.2d 41 (D.C. Cir. 1984)).

> In reviewing a ruling of a trial court on a motion to dismiss under Federal Rule of Civil Procedure 41(b), this court must affirm the ruling unless the trial court has clearly abused its discretion. *Hobson* v. *Wilson*, 737 F.2d 1, 45 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985) [affirming denial of motion to dismiss for failure to prosecute]. In the instant case . . . it is abundantly evident that the district court has correctly decided this matter . . . .

(Opp. at A13.)

The first sentence of their petition here acknowledges that petitioners seek review of the Court of Appeals order "entered in this proceeding on February 12, 1986 . . . ." (Pet. at 1.) Thus, and in light of the proceedings before the lower courts, petitioners assuredly are aware that it is the July 1985 order of dismissal for failure to prosecute which is at issue here. However, petitioners' argument neither discusses the July 1985 order nor explains on what legal theory the prior 1984 interlocutory orders would now properly be considered subject to review. In other words, petitioners' brief is wholly—and willfully—misleading and irrelevant.

REASONS FOR DENYING THE WRIT

The petition should be denied, first, because it directly violates Supreme Court Rules by failing to reveal, much less address, the grounds for dismissal below. Second, review of the factual determinations by the two lower courts is unwarranted in any event, especially given the broad discretion which is accorded to trial courts under Fed. R. Civ. P. 41(b). Third, the 1984 interlocutory orders which petitioners disingenuously ask this Court to review are now moot and are not properly subject to such examination. Fourth, these 1984 orders were appropriate in any case, since they did not deprive petitioners of any constitutional or statutory right and instead merely enforced the contractual agreement underlying this action.

ARGUMENT

I. PETITIONERS' WILLFUL FAILURE TO COMPLY WITH THE RULES OF THIS COURT OR TO ACCURATELY AND CLEARLY EXPLAIN THE ORDER AT ISSUE IS SUFFICIENT REASON TO DENY THIS PETITION.

The rules of this Court expressly provide that a petition for writ of certiorari must make "reference to the official and unofficial reports of any opinions delivered in the courts . . . below" (Rule 21.1(d)); must include a copy of the opinion "by the court whose decision is sought to be reviewed" (Rule 21.1(k)(i)); and must include a copy of "any other such opinions . . . rendered by the courts . . . in the case . . . ." (Rule 21.1(k)(ii)). The goal of these directives is amplified by Supreme Court Rule 21.5, which provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Even during eras when the press of business was much less than it is today, the Court on occasion has denied petitions for failure to comply with this Rule. Providing its own emphasis, the Court explained in dismissing one petition:

> We . . . necessarily rely in an especial way upon petitions, replies, and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy, brevity, and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Furness, Withy & Co. v. *Yang-Tsze Insurance Association*, 242 U.S. 430, 434 (1917).[6] More recently, the Chief Justice has reminded that "[t]his Court must rely on counsel to present issues fully and fairly . . . ." *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring).[7]

Petitioners directly violated several rules of the Court by willfully omitting Judge Hogan's reported July 1985 Memorandum Opinion from their petition and declining to inform the Court that failure to prosecute was the reason for the District Court's order of dismissal. The extent to which this action has impeded an accurate and complete understanding of the facts at issue speaks for itself; indeed, Standard believes it typifies petitioners' conduct in this case and independently justifies an award of double costs and attorney's fees. At minimum, such deception merits denial of the petition.

II. THE JULY 1985 FINAL ORDER OF DISMISSAL ENTERED BY THE DISTRICT COURT AND SUMMARILY AFFIRMED BY THE COURT OF APPEALS DOES NOT RAISE ANY ISSUE APPROPRIATE FOR REVIEW.

Petitioners at most are entitled to seek review of the merits of Judge Hogan's July 1985 final order and the summary affirmance of it by the Court of Appeals. How-

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[6] *See also Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) ("We have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari."); *Kennemer* v. *Billington*, 323 U.S. 709 (1944); *Humble Oil & Refining Co.* v. *Campbell*, 292 U.S. 648 (1934); *Tiger* v. *Lozier*, 275 U.S. 496 (1927).

[7] Cf. *Board of License Commissioners* v. *Pastore*, 469 U.S. 238, 105 S. Ct. 685, 686 (1985) (quoting the further admonition from the Chief Justice's concurrence in *Fusari* that "[i]t is appropriate to remind counsel that they have 'a continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation").

ever, it is a settled principle that this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Petitioners have not endeavored to supply a reason, nor could they, as to why the Court should depart from this rule here.

A trial court has broad discretion, pursuant to both Fed. R. Civ. P. 41(b) and its inherent authority, to dismiss a cause for failure to prosecute or to abide by court orders. *See Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633 (1962); *Thomas* v. *Arn*, —— U.S. ——, 106 S.Ct. 466, 471 (1985). Moreover, this Court understands that such discretionary power must be more than an illusion to be effective:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

The decisions of the District Court and the Court of Appeals, far from warranting review, are entitled to particular deference here. As with the lower court in *National Hockey League*, Judge Hogan's "comprehensive memorandum" opinion shows that he "consider[ed] the full record in determining whether to dismiss," and the full record further demonstrates that he "was extremely patient" in his efforts to induce petitioners to go forward. *Id.* at 642. And the Court of Appeals for the District of Columbia Circuit does not lightly affirm dismissals for failure to prosecute. *See Trakas* v. *Quality Brands, Inc.*, 759 F.2d 185, 186 (D.C. Cir. 1985) (reversing dismissal

for failure to prosecute and noting that "use of the rule has been limited to egregious conduct by dilatory plaintiffs").[8] Yet, the appellate court ruled here that it is "abundantly evident" that this matter was "correctly decided . . . ." (Opp. at A13.) There is no reason for this Court to review Judge Hogan's reasoned, abundantly correct decision yet again.

III. PETITIONERS ARE NOT NOW ENTITLED TO SEEK REVIEW OF THE 1984 INTERLOCUTORY ORDERS.

The petition submitted here does not, of course, address the dismissal for failure to prosecute; it argues in its place that the 1984 stay of discovery first entered by the magistrate and left in place by Judge Hogan violated the Fourteenth Amendment of the United States Constitution. Immediately after Judge Hogan's July 1984 interlocutory order, continuing the stay of discovery pending arbitration, petitioners lodged an appeal of the July order without seeking or obtaining the certification required by Fed. R. Civ. P. 54(b) to appeal an order which is not final as to all counts of a complaint. This first appeal thus was dismissed when the Court of Appeals found that it "lack[ed] appellate jurisdiction" to review it. *Ames* v. *Standard Oil Co. (Indiana)*, C.A. No. 84-5596 (issued January 9, 1985). (Opp. at A1.)

Petitioners lost any right they had to review of the 1984 orders after the dismissal for failure to prosecute

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[8] Judge Scalia dissented from the Court of Appeals ruling in *Trakas* because, in his view, the majority's "decision intrudes upon the discretion that belongs to trial judges and that is essential for the fair and expeditious conduct of their business." 759 F.2d at 188. In order for trial courts to satisfy the end espoused in the majority opinion of "manag[ing] their calendars so as to dispense justice as expeditiously and efficiently as possible," Judge Scalia concluded that "the district judge's 'power to dismiss . . . must be more than theoretical.'" 759 F.2d at 191 (quoting *Automated Datatron, Inc.* v. *Woodcock*, 659 F.2d 1168, 1170 (D.C. Cir. 1981)).

in July 1985. "The substantive merits of a claim are of course irrelevant to the propriety of a dismissal for failure to prosecute . . . ." *Mathes* v. *Commissioner*, C.A. No. 84-5456 (D.C. Cir. 1986) (issued Apr. 18, 1986) (Scalia, J.) (sl. op. at 5). If it were the rule that review of interlocutory orders was proper following dismissal for failure to prosecute, it would encourage the type of conduct petitioners have employed here: flaunting court orders in order to receive the *sanction* of dismissal, and then using that "sanction" as a *de facto* Rule 54(b) "certification" to obtain review of prior interlocutory rulings. The law is properly settled that the courts cannot be manipulated in this manner:

> It would be unwise to encourage all would-be appellants from interlocutory orders to delay for the purpose of dismissal for lack of prosecution and review of otherwise unreviewable decisions. . . . [F]ailure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right.

Ash v. *Cvetkov*, 739 F.2d 493, 497 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 1368 (1985).[9]

Petitioners' ploy, contrary to established law, thus presents no argument worthy of review. As Judge Scalia noted in *Mathes*, upon dismissal for failure to prosecute

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[9] *See also Huey* v. *Teledyne, Inc.*, 608 F.2d 1234, 1239 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982) (" 'If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened' "), quoting *Sullivan* v. *Pacific Indemnity Co.*, 566 F.2d 444, 445-46 (3d Cir. 1977); *Marshall* v. *Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) ("To review the district court's [interlocutory order] under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases").

only *that* order is subject to review because the underlying merits of a cause—including orders related to the merits—are irrelevant; the *conduct* of the party, not the merits of his complaint, is what is then subject to scrutiny. Here, the July 1985 dismissal for failure to prosecute superceded the prior 1984 interlocutory orders pertaining to the merits and these earlier orders thus are not properly subject to review. For the Court to now examine the wisdom of the 1984 rulings would encourage the "blatant disregard of court orders and rules" with which Judge Hogan patiently contended for almost a year.

IV. IN ANY EVENT, THE INTERLOCUTORY ORDERS STAYING DISCOVERY IN 1984 WERE REASONABLE EXERCISES OF DISCRETION WHICH WOULD NOT MERIT REVIEW EVEN IF THEY WERE PROPERLY BEFORE THE COURT.

Standard believes petitioners can advance no argument which even colorably would require the Court to consider review of the 1984 discovery orders. However, even on the issue they deceptively and wrongly assert is before the Court, petitioners have not presented an issue remotely worthy of review. Petitioners' request for review thus would be frivolous even if the issue they press were properly subject to consideration.

Initially, even petitioners' own scant authority—three cases, none of which are directly relevant—recognizes that discovery is subject to necessary limitations. *See Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) ("discovery, like all matters of procedure, has ultimate and necessary boundaries").[10] Accordingly, a District Court's

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[10] Indeed, the Court in each case cited by petitioners held that a *limitation* on discovery was there appropriate. *See Hickman* v. *Taylor*, 329 U.S. 495 (1947) (recognizing limitation of discovery related to attorney work product); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) (reversing lower court order that plaintiff must

rulings pertaining to discovery are subject to reversal only if the court acts "arbitrarily or fancifully . . . ." *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). *See also Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders").

A stay of discovery pending a ruling on a potentially dispositive motion, far from being arbitrary or fanciful, is consistent with "'[t]he principle of judicial parsimony'" recognized in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 694 (1933) (citation omitted).[11] Thus, courts have properly entered protective orders, as was done here, on the ground that the complaint at issue might be subject to arbitration.[12]

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undergo a physical examination); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) (affirming limitation on discovery despite plaintiff's claim that this discovery was needed to respond to a pending motion for summary judgment). In commenting on two of these three decisions, this Court has further observed, with emphasis, that "judges should not hesitate to exercise appropriate control over the discovery process" if necessary "to secure the just, *speedy*, and *inexpensive* determination of every action." *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979) (quoting Fed. R. Civ. P. 1).

[11] *See also* C. Wright, *Federal Courts* § 83 (1983) at p. 562-63, ("where one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided"). Courts time and again have entered protective orders staying discovery where, for example, the court "is convinced that the plaintiff will be unable to state a claim for relief." *Wood* v. *McEwen*, 644 F.2d 797, 801 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982) (affirming stay). *Accord, B.R.S. Land Investors* v. *United States*, 596 F.2d 353, 356 (9th Cir. 1979); *Brennan* v. *Local Union No. 639, International Brotherhood of Teamsters*, 494 F.2d 1092, 1100 (D.C. Cir. 1974); *O'Brien* v. *Avco Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1969).

[12] *See, e.g., Lummus Co.* v. *Commonwealth Oil Refining Co.*, 273 F.2d 613, 614 (1st Cir. 1959) (refusing to order discovery pending

Similarly, it is also beyond doubt that a court may properly stay discovery pending a ruling, as also was issued here, that a contract claim conflicts with the plain and unambiguous language of the contract in dispute.[13]

In sum, the law is completely settled against petitioners even on the issue they erroneously press before the Court. The only authorities petitioners cite hold that the right to discovery is tempered by other concerns; one such concern is to avoid discovery if a dispositive motion may render it needless. Far from "arbitrary or fanciful," the 1984 orders staying discovery here clearly were proper and it is frivolous for petitioners to even ask for additional review.

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ruling on whether arbitration is required because "[u]ntil it is determined whether this action has been properly brought, appellee should not receive any unnecessary fruits thereof"); *Thompson* v. *Zavin*, 607 F. Supp. 780 (C.D. Cal. 1984); *Corcoran* v. *Shearson American Express, Inc.*, 596 F. Supp. 1113 (N.D. Ga. 1984); *Recognition Equipment, Inc.* v. *NCR Corp.*, 532 F. Supp. 271 (N.D. Tex. 1981); *Mississippi Power Co.* v. *Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1976).

[13] Dismissal or summary judgment is appropriate where unambiguous contract language shows a plaintiff is not entitled to relief. *See Jacksonville Newspaper Printing Pressmen and Assistants' Union No. 57* v. *Florida Publishing Co.*, 340 F. Supp. 993, 995 (M.D. Fla.), *aff'd*, 468 F.2d 824 (5th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973). The parol evidence rule bars extrinsic evidence at variance with unambiguous language, and therefore discovery would be useless to "interpret" this clear language. *See Sullivan* v. *Massachusetts Mutual Life Insurance Co.*, 611 F.2d 261, 264 (9th Cir. 1979) (affirming summary judgment based on written contract because proof of alleged oral agreement to the contrary was barred by the parol evidence rule). *See also* 10A, C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d* § 2730.1 (1983) ("when the contract is unambiguous on its face the operation of the parol evidence rule will preclude the introduction of outside evidence to dispute its terms and summary judgment is particularly appropriate").

CONCLUSION

In 1983, Petitioners filed their complaint in the wrong forum by proceeding in court instead of through arbitration. In 1984, when the District Court dismissed some of their claims and stayed others pending arbitration, petitioners filed an appeal at the wrong time because the court's order was not final. In 1985, their entire action was dismissed for failure to prosecute and summarily affirmed thereafter. Now, in 1986, petitioners seek a writ of certiorari asking for review of the wrong order. Petitioners' disingenuous petition should be denied on that basis alone. Moreover, petitioners' complete failure to address the dismissal for failure to prosecute only underscores the frivolous nature of their petition. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS D. YANNUCCI
(Counsel of Record)

KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5056

Attorney for Respondent Amoco Corporation (formerly Standard Oil Company (Indiana))

Dated: August 1, 1986

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-5596

WALTER D. AMES and MARION L. AMES,
Appellants

v.

STANDARD OIL COMPANY (INDIANA)

C.A. No. 83-01183

[Filed Jan. 9, 1985]

Before: Wright, Mikva, and Edwards, Circuit Judges.

ORDER

Upon consideration of Appellee's Motion to Dismiss Plaintiffs' Appeal and Award of Double Costs and Attorney's Fees, and the Opposition and Reply thereto, it is

ORDERED by the court that appellee's motion to dismiss is granted. Because the district court's order in *Ames v. Standard Oil Co.*, C.A. No. 83-1183 (July 26, 1984) does not constitute a final order under 28 U.S.C. § 1291 or an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), this court lacks appellate jurisdiction. *See Carson v. American Brands, Inc.*, 450 U.S. 79 (1981); *Hussain v. Bache & Co., Inc.*, 562 F.2d 1287 (D.C. Cir. 1977). It is

FURTHER ORDERED by the court that appellee's motion for award of double costs and attorney's fees is denied. *See* Fed. R. App. P. 38. It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any petition for rehearing. *See* Local Rule 14.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1183

WALTER D. AMES, *et al.*,
Plaintiffs

v.

STANDARD OIL COMPANY (INDIANA),
Defendant

[Filed July 28, 1985]

MEMORANDUM OPINION

Plaintiffs in the present action have asserted several claims arising out of an alleged breach by defendant Standard Oil Company (Standard) of a stock purchase agreement dated May 25, 1979. In a summary judgment opinion dated July 25, 1984, summary judgment was granted for defendant on contract and tortious interference with contract claims; other claims, alleging RICO violations and fraud, were "stayed until such time as arbitration is completed." The Court's decision was based in large part on the failure of plaintiff to comply with an arbitration clause in the stock purchase agreement.

On August 27, 1984, plaintiffs appealed from the Court's interlocutory order of May 25th. On January 9, 1985, the Court of Appeals of this Circuit granted appellees' motion to dismiss on the grounds that the May 25th order was not a final order on an appealable interlocutory order under 28 U.S.C. § 1292(a)(1).[1]

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[1] Plaintiffs filed a petition for rehearing that was denied on February 20, 1985.

Upon learning of the dismissal of plaintiffs' appeal, the Court sent out notice of a status call to be held on February 13, 1985. Counsel for plaintiffs, Walter Ames, who practices law in Washington, D.C., failed to attend that status call or to inform the Court of his inability to attend. Counsel for defendant, who flew in from Chicago to attend the status conference, was also not informed that plaintiff would be absent. Because of plaintiffs' absence, the status call had to be terminated.

In another attempt to ascertain if plaintiffs were interested in pursuing this litigation, the Court issued an order on April 4, 1985. That order requested that the parties "file a status report informing the Court of their progress in arbitration of the underlying contract claim. If the parties have not proceeded to arbitration, the Court requests that they set forth in detail their intentions with respect to continuing the litigation of this case."

On April 18th, the Court received defendant's status report, but plaintiffs did not respond to the Court's order.[2] Instead, on May 3, plaintiffs moved to amend their complaint, an action that was both meaningless in view of the self-imposed limbo in which plaintiffs' con-

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[2] Plaintiffs later argue that failure to comply with these orders is excusable because plaintiff Ames—acting as counsel for himself and his wife—failed to receive the Court's orders. Plaintiffs "surmise" that this is so because plaintiff's law firm moved its offices approximately a year ago. Given the fact that plaintiff is a member of this bar, he must be aware that Local Rule 1-5(b) requires notice of change of address to be filed by praecipe within 10 days. Otherwise, the address provided on the initial pleading "shall be conclusively taken as the last known address . . . of said party or attorney." Because plaintiff did not file a change of address notice with this Court, the pleadings in question were mailed to his "last known address." Plaintiffs' failure to receive Court Orders is not "unavoidable" or "excusable" but a direct result of his failure to follow Local Rules. It is also additional evidence of plaintiffs' general disregard of this litigation.

duct put the case and contrary to the Court's Order of July 26, 1984. According to that Order, the case was "stayed until such time as arbitration is completed and plaintiffs may then file, if appropriate, a third amended complaint.[3]

On May 17, Standard Oil moved to dismiss on grounds that plaintiff had repeatedly violated court orders and failed to prosecute the case. Standard's Memorandum in Support of Dismissal was joined with a motion in opposition to plaintiffs' move to amend. After receiving a ten-day extension of time, plaintiffs filed a reply to Standard's motion and opposition.

Based on the pleadings before it, the Court would have been justified in dismissing this suit at that time. Plaintiffs' opposition provided no valid justification for his failure to appear and to respond to Court orders. *See supra* fn. 2. More importantly, plaintiffs proffered no suggestion that arbitration was underway or was going to be initiated in the near future. Instead, plaintiffs offered the cryptic "admission" that "they [plaintiffs] obviously prefer litigation to arbitration. If they have to go to arbitration they will." Plaintiffs' Opposition to Motion to Dismiss at 6. Obviously, one would have expected plaintiffs to concede that the question of whether they "have to go to arbitration" was no longer open. Their suggestion that this issue was debatable and their gratuitous observation that the Court of Appeals' dismissal of their appeal was incorrect suggested to the Court that plaintiffs had little interest in pursuing the only course available to them.

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[3] According to plaintiffs, the Order does not say that the plaintiffs may "*only* then file," and so its instruction on the filing of amendments is merely permissive and not restrictive. While plaintiffs are correct as a matter of semantics, in the context of the litigation and in light of the rest of the opinion, the interpretation offered by plaintiff is, at best, a somewhat frivolous excuse for ignoring Court Orders.

However, because dismissal is a strict sanction, the Court offered plaintiffs a final opportunity to demonstrate their intent to prosecute this case. On June 11, 1985 the Court denied both the motion to dismiss and the motion to amend, without prejudice. The Court also ordered that:

> Plaintiffs shall have thirty days from the date of this Order to file a status report with the Court, detailing the steps that plaintiffs have taken to comply with the year-old Court order requiring plaintiffs to submit their claims to arbitration. If, in thirty days, the Court receives no report or learns that arbitration is not yet underway, defendant's motion to dismiss because of failure to prosecute and disobedience to Court orders will receive reconsideration.

Thirty days later, plaintiffs filed their report. Surprisingly, plaintiffs admitted that an arbitration demand had not yet been filed, although plaintiffs did suggest that they had managed to obtain a copy of the arbitration rules and were "studying the rules for initiating arbitration."[4] In short, the plaintiffs' pleading was nonresponsive and completely unsatisfactory.

According to the terms of the Court's order of June 12, 1985, the Court will now turn to a reconsideration of defendant's motion to dismiss.

Standard, in its May 17th motion, argues that this case should be dismissed because of plaintiffs' failure to prosecute this action, *see* Fed.R.Civ.P. 41(b); Local Rule 1-14, and because of plaintiffs' blatant disregard of court orders and rules. The Court now agrees with defendant's position.

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[4] Arbitration rules are, of course, designed for lay persons; thus, the Court has serious reservations about the amount of "study" required to file a "fill-in-the-blanks" arbitration demand.

The federal courts possess undisputed authority to control their dockets and to dismiss those cases that plaintiffs fail to prosecute. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962). Such a dismissal is proper if, in view of the history of the litigation, the litigant has failed to exercise reasonable diligence in pursuing the case. *See, e.g., Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965, 969 (D.C. Cir. 1976). Of course, the question of whether an action is being pursued with "reasonable diligence"—as opposed to "protracted delay"—is a highly factual inquiry, to be determined upon a consideration of all pertinent circumstances. *See Link*, 370 U.S. at 634-35. However, the district courts are not entirely without guidance in exercising this discretion.

It is clear, for example, that a "single act of misconduct" does not usually justify a dismissal. *Trakas v. Quality Brands*, 84-5229, slip op. at 6 (D.C. Cir., April 16, 1985); *Camps v. C & P Telephone Co.*, 692 F.2d 120, 123 (D.C. Cir. 1981); *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977). In addition, dismissal is generally not warranted where the conduct in question is "inadvertent" or "excusable." *See Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958).

On the other hand, a dismissal is clearly an appropriate sanction where, as here, a litigant has engaged in a "course of protracted neglect." *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 121 (D.C. Cir. 1977). Such neglect includes not only failure to pursue the litigation in the district court but also any failure to prosecute in an "alternative forum" such as an agency or arbitration proceeding. *See Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441, 445 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968). Dismissal for failure to prosecute is particularly appropriate when such a failure is coupled with disobedience to court orders or a disregard of established rules. *See Shaeffer v. Warehouse*

Employees Union Local No. 730, 408 F.2d 204, 205 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969).

Although prejudice to opposing counsel is not a condition of dismissal, *Cherry*, 548 F.2d at 970 n.49, the prejudice to the opposing party—in terms of time and expense—may be considered. In fact, recent decisions suggest that prejudice may be presumed where plaintiff fails to diligently prosecute an action. *See, e.g., Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (2d Cir. 1982).

The Court also takes note of the larger concerns of "just, speedy and inexpensive" determination of civil cases, Fed.R.Civ.P. 1, that are frustrated when the Court is required to spend inordinate amounts of time dealing with recalcitrant litigants. Experience teaches that one irresponsible party's repeated delays can cause a ripple effect of delay and postponement in the Court's entire calender. Thus, if the district courts are to avoid exacerbating the already heavy backlog of litigation, the power and willingness to draw the line on dilatory litigants "must be more than theoretical." *Automated Datatron, Inc. v. Woodcock*, 659 F.2d 1168, 1170 (D.C. Cir. 1981). *See also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. (1976) (suggesting need for credibility in enforcement if discovery sanctions are to have required deterrent effect).

In the present case, plaintiffs' record of dilatory prosecution speaks for itself. As the record shows, almost a year has passed since plaintiffs were first ordered to proceed to arbitration. Over six months have passed since the Court of Appeals dismissed plaintiffs' frivolous appeal of that order. In those six months, plaintiffs have ignored or otherwise failed to comply with three Court orders.[5]

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[5] As noted, *supra*, fn. 4, plaintiffs offer an "excuse" for noncompliance that does not justify their ignorance of Court orders. Both local rules and the ethical obligations of the bar require considerably more of counsel than to sit back and hope the Court is

Perhaps the most telling indication of plaintiffs' unwillingness to prosecute this case in accordance with Court Orders was their response to the Order of June 12th, which provided that if "arbitration is not yet underway," in thirty days, the motion to dismiss would be reconsidered. Even this unveiled warning of imminent dismissal [6] failed to rouse plaintiffs from their "slumber," *cf. Cherry*, 548 F.2d at 969. To the surprise of the Court, plaintiffs did not initiate the long-overdue arbitration process in the thirty-day deadline. Instead, plaintiffs nonchalantly suggested that they had just managed to obtain the proper forms and would "momentarily" complete and serve them.

For the most part though, plaintiffs' status report—like their opposition to the motion to dismiss—focuses not on their own challenged conduct. Instead, plaintiffs' briefs on this issue repeatedly question the costs and necessity of arbitration, the legality and accuracy of this Court's (and this Circuit's) opinions, and, in general, treat the issue of arbitration, which has long been settled, as a proper subject for argument. Given this implied belief in their right to "deal with the Court on [their] own terms, as and when [they] pleased," the Court has no reason to believe that plaintiffs have any intention of complying—promptly or otherwise—with the orders of

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able to find him when orders are issued. *See* Reply Memorandum in Support of Standard Motion to Dismiss. At the very least, plaintiffs became aware of this Court's continuing efforts to prod them to action when they received Standard's Status Report of April 18 "in response to the Court's Order of April 4, 1985." Rather than contact the Court or check the case files in the clerk's office to determine what they had missed, plaintiffs blithely ignored the existence of outstanding Court orders.

[6] *See Camps*, 692 F.2d at 125 (suggesting that "advance warning" which "pinpoint[s]" possibility of dismissal and details steps necessary to avoid dismissal is recommended prerequisite to dismissal of *pro se* litigant).

this Court. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 949 (9th Cir. 1976).

Plaintiffs' delay in this action is longstanding; their refusal to follow the rules and orders of this Court is well documented. They have offered no viable reason[7] for allowing this litigation to proceed. In fact, as previously noted, it may have been appropriate to dismiss this action at an earlier time. In any event, the time has now come when dismissal is appropriate and necessary.[8]

The Court does not mean by this opinion to impugn the integrity of plaintiffs, nor does it mean to suggest any comment on the merits of plaintiffs' claims, but it is obvious that plaintiffs were desperately scrambling to avoid the arbitration process. One can gather that plaintiffs did not cherish the expense of arbitration and one

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[7] Indeed, plaintiff Walter Ames' status as counsel renders plaintiffs ill-equipped to plead leniency on one of the leading grounds for avoiding dismissal, the judicial aversion to "visit[ing] the sins of the lawyer upon the client. . . ." *See Woodcock*, 596 F.2d at 121. Where, as here, a member of the bar is appearing *pro se* (for himself and his spouse), any such propensity to lenience may be tempered by the knowledge that plaintiff, equipped with the knowledge and expertise of a practicing attorney, bears full responsibility for his own fate. In addition, the Court warned Mr. Ames, at an early stage in this litigation, of the self-evident dangers of self-representation. Given the decision to disregard this warning, and plaintiff's legal training and experience, no more need be said on this issue.

[8] The Court has considered alternative sanctions but is of the opinion that there is no less drastic alternative that would be appropriate. *See Trakas*, slip op. at 5-6 (Scalia, J., dissenting). This is not a case where there was a single disobedience of court orders or a single failure to appear, which could be partially remedied by ordering attorneys' fees for opposing counsel. Nor is this a situation, as is the case in discovery disputes, where issues may be precluded or claims stricken as an appropriate sanction. Where, as here, a party, over a period of many months and in defiance of the Court, refuses to prosecute an action, an order of dismissal is the only appropriate sanction.

might also surmise that they did not believe their claims would fare well in that forum. Nevertheless, the Court had entered the order, the appeal had been dismissed, and warnings to proceed had been ignored by the plaintiff. *Cf. Bomate v. Ford Motor Company*, 83-2303, slip op. (D.C. Cir., April 2, 1985). If in light of this record, plaintiffs still hoped they could somehow delay and thereby avoid arbitration, one cannot help but read in this record an assurance that hope springs eternal. Litigation, however, should enjoy a significantly shorter lifespan.

Defendant's Motion to Dismiss will be granted; an appropriate Order will issue in accordance with the terms of this opinion.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

Dated: July 26th, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1183

WALTER D. AMES, *et al.*,
Plaintiffs

v.

STANDARD OIL COMPANY (INDIANA),
Defendant

[Filed July 28, 1985]

ORDER

Upon consideration of the defendant's Motion to Dismiss, the plaintiffs' opposition thereto, the entire record, and in accordance with the memorandum opinion issued this day, it is this 26th day of July, 1985, hereby

ORDERED that the above captioned case shall be and is dismissed.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-5597

WALTER D. AMES, *et al.*,
Appellants,

v.

STANDARD OIL COMPANY (INDIANA)

C.A. No. 83-01183

[Filed Feb. 12, 1986]

Before: ROBINSON, *Chief Judge*, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellee's motion for summary affirmance, the opposition, and the reply thereto, it is

ORDERED by the court that the motion for summary affirmance is granted. In reviewing a ruling of a trial court on a motion to dismiss under Federal Rule of Civil Procedure 41(b), this court must affirm the ruling unless the trial court has clearly abused its discretion. *Hobson v. Wilson*, 737 F.2d 1, 45 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985). In the instant case the trial court did not abuse its discretion. Since it is abundantly evident that the district court has correctly decided this matter, further briefing and oral argument would not affect this court's decision. *See Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985).

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14.

Per Curiam

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NO. 85-2164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALTER D. AMES AND MARION L. AMES

Petitioners,

vs.

STANDARD OIL COMPANY (INDIANA),

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S RESPONSE TO MOTION REQUESTING AWARD OF SANCTIONS

Walter D. Ames

1400 K Street, N.W.
Washington, D.C. 20005
(202) 628-0088

Attorney for Petitioners
and Pro Se

Dated: September 25, 1986

NO. 85-2164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WALTER D. AMES AND MARION L. AMES

Petitioners,

vs.

STANDARD OIL COMPANY (INDIANA),

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S RESPONSE TO
MOTION REQUESTING AWARD OF SANCTIONS

Petitioners, Walter D. and Marion Ames, respectfully oppose a Motion by respondent Standard Oil Company (Indiana) requesting an award of double costs and attorneys' fees. Such motion is based on an expurgated quotation clipped by Standard Oil to mask the clear distinction between its case law and the facts at bar.

While petitioners vigorously contest Standard Oil's motion, they hopefully do so with a brevity amounting to laconicness compared to Standard Oil's motion. If the petition for certiorari is so frivolous, why does it take Standard Oil five (5) pages of citations to prove it? Although protesting that petitioners have unreasonably and vexatiously multiplied proceedings, has not Standard Oil done just that? Can this Court imagine the effect on its docket were there a proliferation of Standard Oil's who have the ability to

overwhelm opposing litigants with motions demanding everything perhaps short of a public lynching, rather than simply opposing the grant of certiorari?

More important, how ver, is Standard Oil's deliberate omission of a vital part of a quote, which itself merits an award of costs and attorney's fees to petitionere -- and a grant of the petition.

I. STANDARD OIL'S MOTION IS BASED ON ITS MISINTERPRETATION OF THE ISSUE

Standard Oil bases its motion on the contention that petitioners' failure to include a district court decision dismissing the entirety of the action for petitioners' failure to go to arbitration, constitutes a breach of petitioners' duty to this Court. Respondent neglects to recognize that the sole issue on which the petition for certiorari is based is phrased at pages 10 and 11 of the petition:

> Petitioners recognize the temporal exigencies that bear on this Court. They do not seek a full examination on the merits. Instead, the utter denial of discovery to petitioners here is submitted to be a violation oi due process that this Court can correct without a large expenditure of its time.

That is the basis of the petition, and the appendix meshes with that issue alone. As a consequence, petitioners limited their appendix to those papers they believed were necessary to have this Court understand that despite all pending discovery requests,[1/] the lower court simultaneously granted summary judgment against petitioners on the contract claim and sent that claim to arbitration, while denying other claims that are not arbitrable -- all without discovery.

1/ And despite a motion for a pretrial conference and a motion for leave to take discovery.

In particular, petitioners complied with Rule 21.1(d) and (k) where they concern the issue on appeal and, of course, appended a copy of the judgment of the U.S. Court of Appeals sought to be reviewed. More specifically, petitioners complied with Rule 21.5, which states: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." That is what petitioners did, based on their knowledge of the time this Court can devote to any petition for certiorari and, most important, the point requiring consideration and on which the petition is based.

Standard Oil says "... that the order properly on review is the July 1985 dismissal [of the District Court] for failure to prosecute...." [Motion 9] That is Standard Oil's concept of the issue, not petitioners'. In effect respondent seeks to inject its own issue of appealability of a interlocutory order after a dismissal for failure to arbitrate. If Standard Oil wishes to take such a position, and that argument requires a supplemental appendix, it may add such appendix. However, Standard Oil's position is in error and it knows it.

II. AN INTERLOCUTORY ORDER IS APPEALABLE AFTER A FINAL JUDGMENT HAS BEEN ENTERED

Beginning on page 11 of its Opposition to Certiorari,[2/] Standard Oil has a section entitled, Petitioners are not now entitled to seek review of the 1984 interlocutory orders. It says petitioners did not proceed to arbitration (they could not, as will be explained *infra*); now it says the interlocutory order denying them discovery *in toto* is not subject to appeal.

2/ Apparently incorporated by reference in its motion.

Standard Oil knows there is a marked distinction between the primary case it cites in its Opposition to Certiorari at p. 12 and the facts here, yet deliberately distorts the case and its quotation from it. That case is Ash v. Cvetkov, 739 F.2d 493, 497 (9th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1368 (1985). To show what Standard Oil has done, the full quote at its Opposition p. 12 is repeated, with the expurgated portion underlined.

> It would be unwise to encourage all would-be appellants from interlocutory orders to delay for the purpose of dismissal for lack of prosecution and review of otherwise unreviewable decisions. We agree with Hughley v. Eaton Corporation that the sufferance of dismissal without prejudice because of failure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right.

That part of a single sentence which Standard Oil omitted shows the falsity of its position. The underlined words were omitted because they show that the case is inapplicable, and Standard Oil wanted to hide that fact. All Ash and the cases on which it relies say is that where there is a dismissal without prejudice for failure to prosecute, one cannot on appeal reach prior interlocutory orders. The action at bar is a dismissal with prejudice, and the way that Standard Oil avoids the distinction is to hide it.

The difference between appealing interlocutory orders following a dismissal with or without prejudice is apparent. If interlocutory orders are subject to appeal after a dismissal without prejudice, such a dismissal could be used as a ploy for obtaining interlocutory review, then reinstituting the action. That is a poor ploy on final judgment. Standard Oil should explain to this Court why it placed four dots on page 12 of its

Opposition to the petition for certiorari if not to mask the clear difference between the case it was quoting and the facts at bar. If anything merits an award of sanctions, cutting a quote to give it a different meaning does.

The U.S. Court of Appeals for the Federal Circuit recognized the rule of appealability of interlocutory orders as recently as Glaros v. H. H. Robertson Co., ___ F.2d ___, 230 USPQ 393, 399 (Fed. Cir. July 22, 1986) when it held, citing other courts of appeals but not this Court, "A Rule 56(d) order granting partial summary judgment from which no immediate appeal lies is merged into the final judgment and reviewable on appeal from that final judgment." In common sense, were interlocutory orders not appealable after final judgment, they would constitute a new breed of non-appealable orders.

III. OTHER ISSUES RAISED BY RESPONDENT'S MOTION

Other issues have been raised by Standard Oil that may merit the interest of this Court. They were not put forth in the petition because petitioners believe that utter denial of discovery and then granting summary judgment on the bases of Standard Oil's factual allegations[3/] was so egregious as to warrant the grant of the petition. However, because of the opposition to the petition and Standard Oil's motion, certain other issues that may be of interest are manifest:

1. Is dismissal for failure to prosecute a case an abuse of discretion when the order on which dismissal is based is impossible of compliance?

Such is the case here. In its memorandum opinion and order filed July 26, 1984 [A-4 to A-21 appended to the petition], the

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3/ E.g., that Standard Oil only had 39% of the Class A common stock or that Standard Oil never made any writing regarding its oral promise to make a tender for shares.

district judge ordered plaintiff to arbitration. [A-20] The difficulty is that at A-10 the court had said, "Further, defendant's motion for summary judgment on the breach of contract cause of action will be granted since plaintiff may not claim that the language of the agreement requiring more than 40% ownership of Class A common means ownership of shares other than Class A common since it is inconsistent with the language of the contract." So, the district court told plaintiffs to arbitrate that which it had just determined. There was nothing to arbitrate, and Standard Oil knows it. Why the Court of Appeals would not consider this question is not imaginable.

2. Does the flexible rule that "a promisor may assert against a beneficiary any defense that he could assert against the promisee if the promisee were suing on the contract," Schneider Moving & Storage Co. v. Robins, ___ U.S. ___, 104 S.Ct. 1844 (1984) apply to a donee, rather than a creditor beneficiary, who has but bare knowledge of the facts? It is submitted that whatever the general rule, and this Court held that it should not be applied so inflexibly as to defeat the intentions of the parties, it is not applicable here, where petitioners were not even furnished with a full copy of the agreement under which they were beneficiaries on discovery,[4/] and denial of discovery left them at the mercy of a promisor who had complete knowledge and documents. Since this Court has as recently as Schneider Moving & Storage Co. considered the applicability of the rule, it may consider extending it to donee beneficiaries who never consented to arbitration and against whom arbitration would be particularly onerous.

4/ They were given a copy of the agreement noblesse oblige outside of discovery.

3. The U.S. Court of Appeals for the District of Columbia Circuit failed to follow its own precedent regarding interlocutory appeals. After the district court order granting summary judgment [A-4 to A-21], petitioners appealed to the U.S. Court of Appeals, relying on Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266 (D.C. Cir. 1979) to show why that order, although interlocutory, was appealable. The appeal was dismissed by order filed January 9, 1985. It did not mention Lee v. Ply*Gem. Plaintiffs petitioned for rehearing, tactfully referring, inter alia, to Lee v. Ply*Gem as being a case more recent than those cited by the Court of Appeals. The petition was denied per curiam without comment.

Imagine plaintiffs' amazement when, later in that same year, 1985, a different panel in Noxell Corp. v. Firehouse No. 1 Bar-B-Que Resturant, 771 F.2d 521, 527 (D.C. Cir. 1985) not only called Lee v. Ply*Gem "the controlling decision of this court on appealability," but assessed counsel fees against a lawyer who failed to address Lee v. Ply*Gem. One panel refuses to cite the case and a half year later another panel calls it controlling. The issue should be remanded for en banc determination.

4. Presuming that the precise terms of a contract will be enforced when there is no ambiguity at the time the contract is made, can parol evidence be received when an ambiguity arises by virtue of later acts? Expressed differently, if a patently unambiguous contract is to be given its plain meaning, does that rule apply when a latent ambiguity arises by acts committed after the contract was made? Petitioners believe that they were entitled to discovery concerning later acts -- the issuance of stock convertible into Class A common -- although the contract specifying 40% of Class A common was not ambiguous at the time

it was written, because at that time there was no convertible stock.

IV. THE SUPREME COURT'S POWER TO PUNISH

Of course this Court has the power to punish frivolous pleadings under Rule 49.2. This, however, is a case where the petition should be granted. Rather than being frivolous or omitting relevant facts, it is Standard Oil's motion requesting an award of sanctions that is not only frivolous but deceitful.

In Talamini v. All-State Insurance Co., ___ U.S. ___, 105 S.Ct. 1824 (1985), which appears to be the most recent case of this Court interpreting Rule 49.2, sanctions were denied although an appeal had been improperly taken. In a concurring decision, four members of the Court[5/] believed that the motion under Rule 49.2 should be denied and that the appeal should have been treated as a petition for a writ of certiorari and denied.

Emphasizing that "Freedom of access to the Courts is a cherished value in our democratic society,"[6/] the concurring justices said that any "evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task."[7/] The decision then gives examples of gross abuse of the judicial process: petitioning to generate a fee or to delay proceedings. Counsel here did not petition for certiorari to generate a fee -- counsel is his own client. Nor has the petition

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5/ A fifth justice was of the opinion that, since there was no final judgment to review, the appeal should be dismissed for want of jurisdiction.

6/ 105 S.Ct. at 1827.

7/ Id.

been filed for the purpose of delay -- there is no award of damages which has been stayed pending consideration of the petition. This is a case where if petitioners were wrong, or if complete lack of discovery is not an issue this Court wishes to address, the petition should simply be denied.

The same is not true of Standard Oil's motion. It was designed to harass: to generate work -- for this Court, for petitioners, and for itself. Imagine the time Standard Oil's law firm spent on all those citations! Then, having come up empty-handed and knowing that interlocutory orders merge into a final judgment with prejudice, all Standard Oil could do was expurgate the language that exposed its position ... and swamp the Court with words and citations. It was successful below with such tactics. It is sincerely pleaded that this Court not succumb as well.

V. CONCLUSION

Standard Oil's motion has caused petitioners to do just what they did not wish to do: to muddy the waters of what they believe is a clear issue: is it a violation of due process arbitrarily to deny all discovery to a party, then grant summary judgment on the issues as to which discovery was sought? It is respectfully petitioned that Standard Oil's strategy of moving for an award of costs and attorney's fees at every turn should not prevail, and that Standard Oil be sanctioned for a deliberate omission of a portion of a quotation which, if quoted, would have shown that the case was inapplicable to the present facts. In any case, Standard Oil's motion should be denied, certiorari granted and the action remanded with instructions that petitioners be granted full and complete

discovery prior to entertainment of any motion for summary judgment.

Respectfully submitted,

Walter D. Ames
1400 K Street, N.W.
Washington, D.C. 20005
(202) 628-0088

Attorney for petitioners
and pro se

Dated: September 25, 1986

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 1986 the foregoing Petitioner's Response to Motion Requesting Award of Sanctions was served on respondent, Standard Oil Company (Indiana) by sending a copy to Thomas D. Yannucci, Kirkland & Ellis, 655 Fifteenth Street, N.W., Washington, D.C. 20005, attorneys for respondent, by first-class, postage-prepaid mail.

Walter D. Ames